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Santa Cruz River/Los Angeles River Special Case: Region 9 Preferred Approach

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Summary

- recognize finality of LA District's TNW determination for 2 segments of the SCR to guide JDs while we develop special case
- provide informal 45-day opportunity for technical public input to fill data gaps and address State, public and Congressional demands for more open, inclusive process
- collect field data, Corps files, and analysis from Johnson case this fall
- complete draft decisions by mid-December that are site-specific and applying existing policy/guidance/case law
- evaluate all bases for jurisdiction, including navigability, interstate, and tributary connections

Proposed Schedule

1. By Sept. 30, post notice on R9 website and through email distribution to interested parties:
 - inviting informal submission of technical data and information about SCR/LAR navigability
 - noting that LA District's SCR TNW decision for 2 segments is in effect as suspension period expired.
2. By Oct. 31, obtain Corps files on LAR and SCR TNW analysis (files now undergoing careful review by Corps HQ for FOIA/Congressional release).
3. In October-November, R9 staff conduct 2 days of field work on SCR and 1-2 days on LAR.
4. In October-November, meet with ADEQ, Los Angeles RWQCB, and potentially local agencies to solicit input.
5. By end of November, obtain access to detailed analysis of SCR prepared for Johnson case.
6. By mid December, HQ and R9 staff prepare draft site-specific decisions on LAR and SCR:
 - LAR decision focuses on whether additional segments are TNWs based on existing hydrology, navigation records, access, and future restoration plans.
 - SCR decision focuses on whether additional segments are TNWs and application of regulations concerning jurisdiction over interstate waters and their tributaries.
7. By mid January, finalize special case decisions.

Option: Fast track (a)(2) decision on Santa Cruz: Find SCR jurisdictional based on straightforward assertion of 328.3(a)(2), which covers interstate waters. SCR, which crosses one national and 3 tribal boundaries, meets the interstate water definition and federal interest in protecting inter-jurisdictional waters. As 328.2(a)(5) says tributaries to (a)(2) waters are also

jurisdictional, this finding could apply to tributaries to the SCR. Could be done within weeks without technical analysis, though would require legal analysis to confirm it applies despite Rapanos holdings. Ben already told a reporter we could apply (a)(2) to SCR.

Issues:

1. Recognition of finality of LA District SCR TNW Decision

- supports LA District (DE, Gen. McMahon, and Steve Stockton support)
- basis for Corps to process most JDs, avoids appearance that special case stops work
- EPA HQ-OW concerned this could offend Corps HQ

2. Public notice/open process

- Vital to address Congressional/citizen group concerns about closed Corps process
- HQ concerned this would set precedent for other special cases (we believe this one can be distinguished based on scale and breadth of issues it addresses)
- HQ concerned this invites difficult legal input from discharger groups that will complicate analysis (we know this has/will come anyway)

3. How long should we budget to do this

- Ben seems to now acknowledge a proper technical analysis will take time (at least into the fall)
- If we try to fast track it, would not benefit from information from Johnson case or field work
- OW very concerned that prolonging the decision-making process could result in a multi-agency process involving other federal agencies (OMB, Army, the Corps, etc), and that EPA would not be in control of such a group process.

4. How high is the bar on TNW determination?

- District and R9 make determinations based on hydrology, evidence of boating, and potential interstate recreational access
- Corps HQ and OMB pushing much higher bar, with explicit current interstate commerce connections (boating concessions, ferries, goods shipping, etc.)

5. Are we prepared to assert jurisdiction based on interstate waters (a)(2)?

- R9 and OGC strongly support; growing view within OW to do this at least for SCR itself
- OW likely disinclined to apply to tributaries although OWOW probably supports
- other parties may assert that even interstate waters have to meet Rapanos tests

6. What do we do first- letter response or special case analysis?

- OW interested in preparing responses (not sent out yet) to letters from Homebuilders Association and AZ Stream Navigability Commission before focusing on Special Case process
- OWOW and R9 believe we need to answer the key decision questions before we can answer these letters, and do not see any compelling reason to answer them immediately.